

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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1 Amanda Cerny, *et al.*,

2 Case No.: 2:21-cv-01243-GMN-BNW

3 Plaintiffs,

4 **REPORT AND RECOMMENDATION**

5 v.

6 Canaima LLC d/b/a La Rumba Nightclub,

7 Defendant.

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9 Before the Court is Plaintiffs' Motion for Default Judgment. ECF No. 8. No response has
10 been filed.11 **I. Procedural Background**12 On July 1, 2021, Plaintiffs filed a complaint. ECF No. 1. Plaintiffs allege that they are
13 professional models who earn their livelihood by selling their identity, image, and likeness for
14 the purpose of advertising, endorsing, and promoting products and services. *Id.* at 4. Plaintiffs
15 further allege that Defendant misappropriated Plaintiffs' images and likenesses by publishing
16 altered photos of the Plaintiffs on several of their advertisements without notice, permission, or
17 payment. *See* ECF No. 1.18 Plaintiffs assert six causes of action against Defendant. *Id.* at 18–27. They allege that
19 Defendant violated 15 U.S.C. § 1125 (“the Lanham Act”) by creating false associations between
20 Plaintiffs and Defendant. *Id.* at 18–19. They further allege that Defendant violated their right to
21 publicity under NRS § 597.810 and that Defendant employed deceptive trade practices in
22 violation of NRS § 598.0915. *Id.* at 19–24. Further, Plaintiffs assert causes of action for unfair
23 competition and misappropriation, negligence, and unjust enrichment. *Id.* at 24–27. Plaintiffs
24 seek a permanent injunction prohibiting Defendant from using Plaintiffs' images to promote the
25 club. *Id.* at 28–29. They also request damages. *Id.*

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1 A summons was issued to Defendant and returned as executed on July 23, 2021. ECF No.
2 5. Defendant did not answer or otherwise respond to Plaintiffs' complaint. Accordingly, on
3 August 20, 2021, Plaintiffs moved for entry of a clerk's default. ECF No. 6. The clerk granted
4 this request on September 10, 2021. ECF No. 7. Now, Plaintiffs move for default judgment
5 against Defendant. ECF No. 8.

6 **II. Jurisdiction**

7 The Court has subject matter jurisdiction over this case under 28 U.S.C. § 1331, as this
8 case arises under the laws of the United States, namely the Lanham Act. The Court also has
9 supplemental jurisdiction over Plaintiffs' related state law claims under 28 U.S.C. § 1337, as
10 these claims are so related to the claims over which the Court has original jurisdiction that they
11 form part of the same case or controversy.

12 The Court also has personal jurisdiction over Defendant because the Defendant is
13 organized in Nevada and the conduct giving rise to this case occurred in Nevada. *See* ECF No. 1
14 at 3; *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987) (upon entry of
15 default, all well-pled facts in the complaint are taken as true except those relating to the amount
16 of damages).

17 **III. Discussion**

18 **A. Legal Standard**

19 Under Federal Rule of Civil Procedure 55(b)(2), the court may enter default judgment if
20 the clerk previously entered a default based on the defendant's failure to defend. After entry of a
21 default, the factual allegations in the complaint are taken as true, except those relating to
22 damages. *TeleVideo Sys.*, 826 F.2d at 917-18; Fed. R. Civ. P. 8(b)(6) ("An allegation—other than
23 one relating to the amount of damages—is admitted if a responsive pleading is required and the
24 allegation is not denied."). Whether to grant a default judgment lies within the court's discretion.
25 *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). In deciding whether to enter a default
26 judgment, the court considers factors such as:

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(1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471–72. A default judgment generally is disfavored because “[c]ases should be decided upon their merits whenever reasonably possible.” *Id.* at 1472.

B. Analysis

Here, the Court has discretion to enter a default judgment, as the clerk previously entered a default based on Defendant's failure to defend. *See ECF No. 7.* Accordingly, the Court considers the seven *Eitel* factors to determine if entering a default judgment is appropriate in this case.

First, the Court considers the possibility of prejudice to Plaintiffs. Plaintiffs would be prejudiced if they had to try this case rather than obtain a default judgment, as trial would require additional expenditure of human and financial resources. These expenses and efforts are unnecessary because the complaint alleged sufficient facts to demonstrate Defendant's unlawful conduct, those allegations are uncontested, and there is no other meaningful avenue for the Plaintiffs to seek relief. *See United States v. \$150,990.00 in U.S. Currency*, No. 2-12-CV01014-JAD, 2014 WL 6065815, at *2 (D. Nev. Nov. 10, 2014) (“[T]he government would be prejudiced by having to expend additional resources litigating an action that appears to be uncontested. This factor favors default judgment.”). Accordingly, the first factor cuts in favor of entering a default judgment.

Second, the Court considers the merits of Plaintiffs' substantive claim. Plaintiffs filed a detailed complaint describing Defendant's unlawful conduct. These allegations are uncontested and are now deemed admitted. *See Fed. R. Civ. P. 8(b)(6)*. This factor cuts in favor of entering a default judgment.

Third, the Court considers the sufficiency of the complaint. As previously stated, the complaint is detailed. It sufficiently sets forth Plaintiffs' claims under the liberal pleading

1 standard of Rule 8 of the Federal Rules of Civil Procedure. This factor cuts in favor of entering a
2 default judgment.

3 *Fourth*, the Court considers the sum of money at stake in the action. Plaintiffs seek a total
4 of \$400,000. ECF No. 16 at 3. This is not a small sum, but those who engage in false or
5 misleading advertising using other people's images and likenesses can profit enormously from
6 their conduct (and it can be damaging to the people whose images are used). Accordingly, this
7 factor neither cuts for nor against entering a default judgment.

8 *Fifth*, the Court considers the possibility of a dispute concerning material facts. Currently,
9 there is no dispute over any material facts. And given Defendant's failure to participate in this
10 case, a dispute over any material facts is unlikely. This factor cuts in favor of entering a default
11 judgment.

12 *Sixth*, the Court considers whether the default was due to excusable neglect. There is no
13 evidence that Defendant's default is due to excusable neglect. Despite being served with process,
14 Defendant has not responded for over a year. *See* ECF No. 5. This factor cuts in favor of entering
15 default judgment.

16 *Seventh*, the Court considers the strong policy underlying the Federal Rules of Civil
17 Procedure favoring decisions on the merits. While the Federal Rules favor decisions on the
18 merits, they also frequently permit termination of cases before the court reaches the merits. As
19 Rule 55 indicates, one such instance is when a party fails to defend against an action. Thus, the
20 preference to decide cases on the merits does not preclude a court from entering a default
21 judgment. *Kloepping v. Fireman's Fund*, No. C 94-2684 TEH, 1996 WL 75314, at *3 (N.D. Cal.
22 Feb. 13, 1996). While cases should be decided on the merits when possible, given Defendant's
23 failure to participate in this case, a decision on the merits is "impractical, if not impossible." *See*
24 *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002.). Accordingly, this
25 factor cuts in favor of granting a default judgment.

26 Considering all the *Eitel* factors, the Court finds, in its discretion, that entering a default
27 judgment in this case is appropriate.

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1 **C. Relief Requested**

2 As previously noted, Plaintiffs seeks a permanent injunction and damages. The Court will
3 analyze the propriety of each form of relief requested.

4 **1. Permanent Injunction**

5 Plaintiffs seeks a permanent injunction enjoining Defendant from using their images to
6 promote Defendant. ECF No. 1 at 28; ECF No. 8 at 10–13. “[A] permanent injunction may be
7 entered where the Plaintiffs shows: ‘(1) that it has suffered an irreparable injury; (2) that
8 remedies available at law, such as monetary damages, are inadequate to compensate for that
9 injury; (3) that, considering the balance of the hardships between the plaintiffs and defendant, a
10 remedy in equity is warranted; and (4) that the public interest would not be disserved by a
11 permanent injunction.’” *La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 879
12 (9th Cir. 2014). Injunctive relief is almost always appropriate in trademark and unfair
13 competition cases, “since there is no adequate remedy at law for the injury caused by a
14 defendant’s continuing infringement.” *Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175,
15 1180 (9th Cir. 1988).

16 Here, the Court finds that a permanent injunction is appropriate. First, Plaintiffs have
17 suffered and will continue to suffer irreparable injury without a permanent injunction. Second,
18 remedies at law (including monetary damages) are inadequate to compensate Plaintiffs for the
19 ongoing damage they will suffer if the misappropriation of their images is allowed to continue.
20 Third, considering the balance of the hardships between Plaintiffs and Defendant, a permanent
21 injunction is still warranted. The Defendant has no right to infringe on Plaintiffs’ image and
22 likenesses. Fourth, the public interest is not disserved by a permanent injunction. To the contrary,
23 the public will be served by a permanent injunction that prevents consumer confusion about
24 Plaintiffs’ affiliation with or endorsement of Defendant. Accordingly, a permanent injunction
25 that prohibits Defendant from continuing to misappropriate Plaintiffs’ image is warranted.

26 How broad this permanent injunction should be is different question. Federal Rule of
27 Civil Procedure 65(d)(1) provides that every injunction must contain: the reasons why it was
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1 issued, its specific terms, and the acts restrained. Rule 65(d)(2) provides that only the following
2 people or entities who receive actual notice of the order by personal service or otherwise can be
3 bound by it: parties, parties' officers, agents, servants, employees, attorneys, and others who are
4 in active concert or participation with the aforementioned.

5 Having considered Plaintiffs' request for an injunction and the law, the Court
6 recommends the following permanent injunction: Defendant Canaima LLC d/b/a La Rumba
7 Nightclub, and all its officers, agents, servants, employees, attorneys, and all others who are in
8 active concert or participation with the aforementioned are permanently enjoined from using in
9 commerce (including distributing, promoting, advertising, and/or displaying) any image, photo,
10 or likeness of Plaintiffs likely to cause confusion about whether Plaintiffs previously or currently
11 work, promote, endorse, or are affiliated with Defendant.

12 The Court notes that Defendant previously misappropriated Plaintiffs' images or
13 likenesses in their social media posts including but not necessarily limited to the following:

- 14 1. Social media posts misappropriating Amanda Cerny's image or likeness on
15 i. December 24 and 26, 2020 (ECF No. 1 at 5);
16 2. Social media posts misappropriating Carissa Rosario's image or likeness on
17 i. October 24, 2020 (*Id.* at 6);
18 3. Social media posts misappropriating Claudia Sampedro's image or likeness on
19 i. January 14, 2019; February 28, 2021; March 14, 2021; April 18, 2021; and
20 May 2, 2021 (*Id.* at 7);
21 4. Social media posts misappropriating Jessica Hinton's image or likeness on
22 i. October 15, 2018 (*Id.* at 8);
23 5. Social media posts misappropriating Lina Posada's image or likeness on
24 i. October 28, 2020 (*Id.* at 9);
25 6. Social media posts misappropriating Monica Leigh Burkhardt's image or likeness
on
26 i. November 27, 2020 (*Id.* at 10);
27 7. Social media posts misappropriating Rosa Acosta's image or likeness on
28 i. November 4, 2019 and January 4, 2020 (*Id.* at 11);
8. Social media posts misappropriating Sandra Valencia's image or likeness on
i. April 1, 2021 (*Id.*).

As part of the Court's permanent injunction, these posts must be taken down.

2. Damages

“A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings.” Fed. R. Civ. P. 54(c). In Plaintiffs’ complaint, they requested damages of not less than \$75,000. ECF No. 10 at 19, 22, 24, 25.

In connection with their motion for default judgment, Plaintiffs request \$400,000 in actual damages. *See* ECF No. 16. Plaintiffs included a sworn declaration of an expert in the modeling and talent industry, Stephen Chamberlin. *See* ECF No. 16-1. Mr. Chamberlin opined on the fair market value of each Plaintiff's image that was appropriated by the Defendant based on several factors related to how the talent industry is priced. *See id.* After considering the relevant factors, Mr. Chamberlin opined that each Plaintiff suffered the following damages:

1. Amanda Cerny - \$150,000 (*id.* at 6);
 2. Carissa Rosario - \$20,000 (*id.* at 6-7);¹
 3. Claudia Sampedro - \$80,000 (*id.* at 7-8);
 4. Jessica Hinton - \$60,000 (*id.* at 8-9);
 5. Lina Posada - \$15,000 (*id.* at 9);
 6. Monica Leigh Burkhardt - \$20,000 (*id.* at 10);
 7. Rosa Acosta – \$40,000 (*id.* at 10-11);
 8. Sandra Valencia – \$15,000 (*id.* at 11-12).²

Mr. Chamberlin calculated Plaintiffs' total damages to be \$400,000. *Id.* at 12.

The Court finds that Plaintiffs have sufficiently proven they suffered these damages. Plaintiffs allege that they are well-known professional models who earn their livelihood modeling and selling their identity, image, and likeness to companies, magazines, and individuals for the purpose of advertising, endorsing, or promoting products and services. ECF No. 1 at 4. Plaintiffs further allege that Defendant misappropriated Plaintiffs' image and likenesses by repeatedly publishing them in misleading and deceptive manners. *Id.* Defendant did this to make it appear like Plaintiffs worked at, promoted, or endorsed Defendant. *Id.* at 12.

¹ Mr. Chamberlin's declaration appears to contain a typo, wherein he refers to Ms. Rosario as "Campos." See *id.* at 6–7.

² Mr. Chamberlin's declaration appears to contain a typo, wherein he refers to Ms. Valencia as "Acosta." See *id.* at 11–12.

1 None of the Plaintiffs consented to Defendant using their images. *Id.* And Plaintiffs have not
2 received any payment for Defendant's use of their images. *Id.* at 13. These allegations are all
3 deemed true. *See Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 702 (9th Cir. 2008)
4 ("[A]ll factual allegations in the complaint are deemed true."). Based on these facts and the
5 expert opinion of Mr. Chamberlin, the Court finds it is just to award Plaintiffs \$400,000 in actual
6 damages.

7 **IV. Conclusion and Recommendation**

8 **IT IS THEREFORE RECOMMENDED** that Plaintiffs' motion for default judgment
9 (ECF No. 8) be GRANTED.

10 **IT IS FURTHER RECOMMENDED** that default judgment be entered in favor of
11 Plaintiffs and against Defendant Canaima LLC d/b/a La Rumba Nightclub.

12 **IT IS FURTHER RECOMMENDED** that Defendant Canaima LLC d/b/a La Rumba
13 Nightclub, and all its officers, agents, servants, employees, attorneys, and all others who are in
14 active concert or participation with the aforementioned be permanently enjoined from using in
15 commerce (including distributing, promoting, advertising, and/or displaying) any image, photo,
16 or likeness of Plaintiffs likely to cause confusion about whether Plaintiffs previously or currently
17 work, promote, endorse, or are affiliated with Defendant.

18 The Court notes that Defendant previously misappropriated Plaintiffs' images or
19 likenesses in their social media posts, including but not necessarily limited to the following:

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26 2, 2021
- 27 4. Social media posts misappropriating Jessica Hinton's image or likeness on
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6. Social media posts misappropriating Monica Leigh Burkhardt's image or likeness on
7. i. November 27, 2020

- 1 7. Social media posts misappropriating Rosa Acosta's image or likeness on
- 2 i. November 4, 2019 and January 4, 2020
- 3 8. Social media posts misappropriating Sandra Valencia's image or likeness on
- 4 i. April 1, 2021

5 As part of the Court's permanent injunction, these posts must be taken down.

6 **IT IS FURTHER RECOMMENDED** that Defendant be ordered to pay Plaintiffs
7 \$400,000 in actual damages as follows:

- 8 1. Amanda Cerny shall receive \$150,000.
- 9 2. Carissa Rosario shall receive \$20,000.
- 10 3. Claudia Sampedro shall receive \$80,000.
- 11 4. Jessica Hinton shall receive \$60,000.
- 12 5. Lina Posada shall receive \$15,000.
- 13 6. Monica Leigh Burkhardt shall receive \$20,000.
- 14 7. Rosa Acosta shall receive \$40,000.
- 15 8. Sandra Valencia shall receive \$15,000.

16 **V. Notice**

17 This report and recommendation is submitted to the United States District Judge assigned
18 to this case under 28 U.S.C. § 636(b)(1). A party who objects to this report and recommendation
19 may file a written objection supported by points and authorities within fourteen days of being
20 served with this report and recommendation. Local Rule IB 3-2(a). Failure to file a timely
21 objection may waive the right to appeal the district court's order. *Martinez v. Ylst*, 951 F.2d
22 1153, 1157 (9th Cir. 1991).

23 DATED: August 11, 2022.

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Brenda Weksler
United States Magistrate Judge